87-421

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

ROBERT TERRY BRAVO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

MICHAEL IAN GAREY
Attorney at Law
611 Civic Center Drive West
Penthouse Suite, 4th Floor
Santa Ana, California 92701

Attorney for Petitioner

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or call collect (402) 342-2831

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QUESTION PRESENTED

DOES THE WARRANTLESS SEARCH OF A PROBATIONER'S RESIDENCE, WITHOUT REASONABLE SUSPICION OR REASONABLE GROUNDS VIOLATE THE FOURTH AND FOURTEENTH AMENDMENTS?

TABLE OF CONTENTS

	Page
Question Presented	i
Opinions Below	2
Jurisdiction	2
Constitutional And Provisions Involved	2
Statement Of The Case	2
Statement Of The Facts	3
How The Federal Question Is Presented	4
Reasons Why The Writ Should Be Granted	5

TABLE OF AUTHORITIES

	Page
Griffin v. Wisconsin (1987) — US — (97 L.Ed.2d 709)	5, 6
New York v. Berger, — U.S. —, 96 L.Ed.2d 601 (1987)	6
O'Connor v. Ortega, 480 U.S. — (1987)	6
People v. Bravo (1987) 43 Cal. 3d 600	1
U.S. v. Bradley, 571 F. 2d 787 (4th Cir. 1978)	6
United States v. Consuelo-Gonzales, 521 F.2d 259	5
United States v. Gay, 774 F.2d 368 (10th Cir. 1985)	6
Walter v. United States, 447 U.S. 649 (1980)	6

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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Petitioner, Robert Terry Bravo, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the California Supreme Court, which held that the search of a probationer's residence without reasonable suspicion did not violate Petitioner's right to be free from unreasonable searches and seizures.

OPINIONS BELOW

The Opinion of The California Supreme Court (Appendix A) is published as *People v. Robert Terry Bravo,* (43 Cal.3d 600 (1987)).

JURISDICTION

The judgment of The Supreme Court of California was filed on July 9, 1987.

This Petition, filed within 60 days of that date, is time. This Court's jurisdiction is invoked under 28 U.S.C.A. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE[1]

Petitioner was charged by information with possession of cocaine and possession of cocaine for sale, and possession of a firearm. (C.T. 44.)

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[1] The designation 'C.T.' refers to the Clerk's Transcript. The designated 'R.T.' refers to the Reporter's Transcript.

Petitioner's motion to suppress evidence was heard, and denied on September 24, 1982. (C.T. 70-71.)

On January 13, 1983 Petitioner pleaded guilty to possession of cocaine for sale, and possession of a firearm (C.T. 92), and was sentenced to probation on various terms and conditions, including that he serve 7 months in the county jail. (C.T. 89.)

Petitioner appealed that ruling to the Court of Appeal, Fourth Appellate District, Division Three. In an Opinion filed on February 26, 1985, that Court in a 2-1 decision reversed Petitioner's conviction, holding that the search of his residence violated his right to be free from unreasonable searches and seizures. The Opinion was published, and was cited at 165 Cal.App.3d 741 (reprinted at 184 Cal.App. 3d 1256 to permit tracking).

The Supreme Court of The State of California granted review, and on July 9, 1987, rendered a judgment affirming Petitioner's conviction, holding that reasonable cause was not required to conduct a search of a probationer's residence, pursuant to a condition of probation in which Petitioner had waived his right to be free from unreasonable searches and seizures.

STATEMENT OF FACTS

The relevant facts are detailed in the Opinion of the Supreme Court of the State of California, therefore only a few summarizing statements are added.

Petitioner had in 1981 pleaded guilty to possession of concentrated cannabis. He was granted probation, and

agreed to "submit his person and property to search or seizure at any time of the day or night by any law enforcement officer with or without a warrant." He was still on probation at all times herein relevant.

In February, 1982, an anonymous caller stated to the Anaheim Police Department that he was a neighbor of Bravo, who had recently moved into the neighborhood, and thought narcotics trafficking was in progress at Bravo's residence. He reported a volume of automobiles and persons at the residence. (R.T. 76-77, 43-43). The caller stated that he only felt trafficking was going on, and did not know Bravo. (R.T. 81.)

Surveillance of Petitioner's residence did not substantiate the anonymous tip. This surveillance was conducted from February 25, 1982 to March 23, 1982. (R.T. 35-36.)

In the meantime the officers had learned that Petitioner was subject to search and seizure, and was on probation. Despite the fact that the officer by this time had questions about the accuracy of the informant's tip, based on the inability to confirm it by surveillance, a search was conducted on March 23, 1982, almost one month after receipt of the unconfirmed anonymous tip.

HOW THE FEDERAL QUESTION IS PRESENTED

Petitioner sought unsuccessfully in the trial court to suppress the fruits of the warrantless search of his residence. (C.T. 71a).

After conviction he appealed successfully to the Court of Appeals, Fourth Appellate District, Division Three.

Review was granted by the California Supreme Court, in its Opinion holds that the warrantless search of a

probationer's residence does not violate his right to be free from unreasonable searches and seizures, even if not supported by reasonable suspicion.

REASONS WHY THE WRIT SHOULD BE GRANTED

The decision of the California Supreme Court, in holding that the warrantless search of Petitioner's residence did not violate Petitioner's right to be free from unreasonable searches and seizures, is inconsistent with the *ratio decidendi* of this Court's recent holding in *Griffin v. Wisconsin* (1987) — U.S. — (97 L.Ed.2d 709.)

In this context, it should first be noted that the search was not conducted by probation officials. It was a law enforcement search. In *Griffin,* this court held relaxed Fourth Amendment standards applied to probation searches because of the "special needs" of that supervision. This Court stated *Id.*, — U.S. —:

> A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements.

This rationale would seem to have no application where a search is conducted by ordinary law enforcement officials. Federal authority on this point casts doubt on the validity of extending the probation search rationale to law enforcement searches, although this appears based on regulation. *United States v. Consuelo-Gonzales,* 521 F.2d 259.

Further, even in the context of the special needs of a probation search, this Court held valid a Wisconsin rule

allowing such searches because the Wisconsin rule required reasonable grounds. The California Supreme Court Opinion rejects a requirement of "reasonable suspicion", and allows such searches without any such requirement, and thus appears inconsistent with the rationale of this Court's holding in *Griffin.*

Moreover, the Supreme Court of California so held, despite the fact that Petitioner's prior waiver did not expressly waive the requirement of probable cause or reasonable suspicion. It is respectfully submitted that, to be valid a Fourth Amendment can be construed no broader than its express terms. See, *Walter v. United States,* 447 U.S. 649, 656 (1980), (opinion by Stevens, J.); *United States v. Gay,* 774 F.2d 368, 377 (10th Cir. 1985); *U.S. v. Bradley,* 571 F.2d 787 (4th Cir. 1978).

In situations involving "special needs", this Court has approached Fourth Amendment issues by a balancing approach. *O'Connor v. Ortega,* 480 U.S. — (1987), *Griffin v. Wisconsin, supra; New York v. Burger,* — U.S. —, 96 L.Ed.2d 601 (1987). It would seem inappropriate to apply that standard to the present case, since, while it involves a probationer, the search was not conducted by probation officers.

Moreover, even if such a balancing test is applied, the special needs of probation supervision do not justify a search for new criminal activity in the absence of any cause whatsoever. A standard at least as great as "reasonable grounds", or "reasonable suspicion" must apply, based on analogous special needs situations analyzed in this Court's holding in *Griffin v. Wisconsin,* and *O'Connor v. Ortega, supra.*

Wherefore, Petitioner respectfully requests this Honorable Court to grant Certiorari.

Dated this 8th day of September, 1987.

Respectfully submitted,

MICHAEL IAN GAREY
Attorney at Law
611 Civic Center Drive West
Penthouse Suite, 4th Floor
Santa Ana, California 92701

Attorney for Petitioner

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

(Filed July 9, 1987)

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	Crim. 24540
	)	
v.	)	CA 4/3 G000726
	)	
ROBERT TERRY BRAVO,	)	(Super. Ct. No. A448393)
	)	
Defendant and Appellant.	)	
	)	

In this proceeding we review a decision of the Court of Appeal reversing a judgment of conviction in a criminal case. (Cal. Rules of Court, rule 28(a)(2).) The Court of Appeal held that a condition of probation that expressly authorizes only a warrantless search cannot properly be construed as permitting a search without reasonable cause. We disagree and reverse the judgment of the Court of Appeal.

I

On January 20, 1981, appellant was convicted of possessing concentrated cannabis (Health & Saf. Code, § 11357, subd. (a)). He was granted probation and, as a condition of that probation, agreed to "submit his person and property to search or seizure at any time of the day or night by any law enforcement officer with or without a warrant."[1] Appellant was still on probation and subject

[1]The minute order form dated January 20, 1981, which reflects the grant of probation, bore entries imposing the follow-

(Continued on following page)

to the search condition in February 1982 when an anonymous informant, who stated that he was a neighbor, telephoned the Anaheim Police Department and reported that the volume of traffic in automobiles and people in and around appellant's home suggested to the caller that appellant was involved in the sale of narcotics.[2]

Police officers conducted surveillance of appellant's home, but observed nothing to substantiate the caller's suspicions other than one occasion when numerous persons who might have been engaged in construction in the rear yard came and went. After ascertaining appellant's name, however, the officers learned that he was on probation and subject to search without a warrant. They confirmed this by obtaining a copy of the probation conditions. On March 19, 1982, the officers conducted a search of appellant's home in his presence, pursuant to the apparent waiver of Fourth Amendment rights reflected in the probation

(Continued from previous page)

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ing terms and conditions relevant to petitioner's probation: 1. "Proceeding suspended." 2. "Probation granted for a period of two years. (See Conditions listed below.)" 3. "Not use or possess any narcotics, dangerous or restricted drugs or associated paraphernalia, except with valid prescription, and stay away from places where users congregate." 4. "Not associate with persons known by you to be narcotic or drug users or sellers." 5. "Submit to periodic anti-narcotic tests as directed by the probation officer." 6. "Seek and maintain training, schooling or employment as approved by probation officer." 7. "Maintain residence as approved by probation officer." 8. *"Submit his person and property to search or seizure at any time of the day or night by any law enforcement officer with or without a warrant."* (Italics added.) 9. "Obey all laws, orders, rules and regulations of the probation department and of the court."

[2]The police report regarding the telephone call indicated that an anonymous neighbor had reported that defendant had

(Continued on following page)

order.[3] The trial court found, and appellant does not challenge the finding, that the officers conducted the search for a proper law enforcement purpose, not for harassment.

The search of the appellant's home led to discovery and seizure of cocaine, firearms, and a large amount of cash. He was charged with possession of cocaine (Health & Saf. Code, § 11350), possession of cocaine for sale (Health & Saf. Code, § 11351), and possession by a convicted felon of a concealable firearm (Pen. Code, § 12021). After his motions to set aside the information (Pen. Code, § 995) and to suppress the evidence seized in his home (Pen. Code, § 1538.5) were denied by the trial court, appellant pleaded guilty to the charges of possessing cocaine for sale and possession of a concealable firearm. He appealed from the ensuing judgment pursuant to Penal Code section 1538.5, subdivision (m).

Appellant claimed in his appeal that the search of his residence was unlawful because the Anaheim police officers who conducted the search lacked reasonable cause to do so. He acknowledged that he was subject to search as a condition of probation, and he made no claim that the waiver effected by the acceptance of that condition was not voluntary or that the search condition was unreasonable. (See

(Continued from previous page)

"just moved into the neighborhood. Has girlfriend—doesn't live there. Constant foot/vehicle traffic. Does not work." The "nature of the complaint" entry stated "Sales/Narcotics."

[3]Because this matter arose before the adoption of article I, section 28, subdivision (d) of the California Constitution, the admissibility of the evidence seized in this warrantless search must be tested under article I, section 13 of the California Constitution as well as the Fourth Amendment. In this case, however, the analysis and resolution are the same under both provisions.

People v. Lent (1975) 15 Cal.3d 481, 486; People v. Mason (1971) 5 Cal.3d 759, 764-765, cert. den. (1972) 405 U.S. 1016, disapproved on other grounds in *People v. Lent,* supra, at fn. 1.) He argued, however, that notwithstanding the search condition of his probation, a "rule of reasonableness" applied, permitting a search only if there were reasonable cause to believe he was currently involved in criminal activity.

The Court of Appeal did not reach the questions of whether search conditions in general are subject to such a rule or, if not, whether a search condition which dispenses with any cause is valid. Instead, it held that the specific probation condition accepted by this appellant did not waived all protection from "unreasonable searches." The Court of Appeal reasoned that because a search condition is a waiver of a fundamental constitutional right, it should be interpreted narrowly as with other advance waivers of constitutional rights. The proper narrow construction, the court concluded, was that the condition waived the right to be free from warrantless searches, but not the right to be free from "unreasonable" searches, as that term may be defined in the context of a probation search.[4] The court held that the search of appellant's apartment, based only on uncorroborated information—which subsequent investigation did not confirm—provided by an anonymous, untested informant, was unreasonable by any standard.

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[4]Although the Court of Appeal recognized that something less than probable cause would satisfy the reasonableness requirement for probation searches, it did not adopt a specific standard.

The People, seeking review of this decision, argue that an express waiver of both the warrant requirement and reasonable cause is not necessary when a defendant agrees as a condition of probation to submit to search "at any time with or without a warrant." Relying on our statement in People v. Mason, supra, 5 Cal.3d at page 765, that a probationer who has agreed to submit at any time to a warrantless search "may have no expectation of traditional Fourth Amendment protection," the People argue that this agreement alone waives all protection under the Fourth Amendment. If the waiver is not interpreted this broadly, the People suggest, the purpose of the search condition—deterrence of further narcotic-related offenses by the probationer—will be defeated. The Court of Appeal, it is argued, has confused the proposition that acceptance of a search condition does not waive the right to object to a search conducted in an unreasonable manner, with the rule that a search condition does waive the right to expect that a search will be undertaken only on reasonable cause.

II

A search conducted pursuant to a valid consent does not violate the Fourth Amendment unless the search exceeds the scope of the consent. (Washington v. Chrisman (1982) 455 U.S. 1, 9-10.) Appellant acknowledges that he voluntarily consented to be searched without a warrant at any time. The only issue therefore is the scope of appellant's consent.

The Court of Appeal believed that waivers of Fourth Amendment rights are subject to the same strict scrutiny as are waivers of other fundamental rights. For that rea-

son the court apparently applied the strict standard of Johnson v. Zerbst (1938) 304 U.S. 458, which rejects an implied waiver and requires a showing that the waiver is both "knowing and intelligent." This court too, has used the language of *Johnson* with respect to the waiver of Fourth Amendment rights, stating in People v. Myers (1972) 6 Cal.3d 811, 819, that while those rights may be waived, "the waiver must appear of record to have been knowingly and intelligently made." As we later explained in People v. James (1977) 19 Cal.3d 99, 117-118, however, in *Myers* there had been no waiver at all. In *James* we rejected as unnecessary and impractical a requirement that officers soliciting a waiver of Fourth Amendment rights expressly advise the person of those rights. We concluded that if a person of normal intelligence is asked to give consent for a search he will infer that he has a right to withhold that consent. We referred with approval to the explanation given by the United States Supreme Court in Schneckloth v. Busamonte (1973) 412 U.S. 218, 235-246, for distinguishing consents to search from waivers of other constitutional rights. (19 Cal.3d 99, 118, fn. 17.)

In *Schneckloth* the high court reasoned that the purpose and application of the "knowing and intelligent waiver" requirements of *Johnson v. Zerbst,* supra, 304 U.S. 458, do not require or justify extension to a consent to search of the strict test of a valid waiver of constitutional rights, a test designed to protect the fairness of the trial itself. "There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application

of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.

"A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided. . . .

"The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial. . . . The guarantees of the Fourth Amendment stand 'as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. . . .' [Citation.] [¶] Nor can it even be said that a search, as opposed to an eventual trial, is somehow 'unfair' if a person consents to a search. . . . [T]here is nothing constitutionally suspect in a person's voluntarily allowing a search. . . . And, unlike those constitutional guarantees that protect a defendant at trial, it cannot be said every reasonable presumption ought to be indulged against voluntary relinquishment." (Schneckloth v. Bustamonte, supra, 412 U.S. at pp. 241-243.)

In *Schneckloth* the court considered also the impracticability of expecting police officers in the field to undertake a detailed examination of the individual's understanding of his rights and the impact of the waiver demanded by

Johnson v. Zerbst, supra, 304 U.S. 458. "It would be unrealistic to expect that in the informal, unstructured context of a consent search, a policeman, upon pain of tainting the evidence obtained, could make the detailed type of examination demanded by *Johnson.*" (412 U.S. at p. 245.)

Here, too, the reasoning of *Schneckloth* leads us to conclude that the strict test of waiver of *Johnson v. Zerbst* and principles of narrow construction have no application in determining the scope of appellant's consent to search given as a condition to the grant of probation. Rather, appellant's waiver of his Fourth Amendment rights must be interpreted on the basis of an objective test. Law enforcement officers who rely on search conditions in probation orders, the probationer himself, and other judges who may be called upon to determine the lawfulness of a search, must be able to determine the scope of the condition by reference to the probation order. We cannot expect police officers and probation agents who undertake searches pursuant to a search condition of a probation agreement to do more than give the condition the meaning that would appear to a reasonable, objective reader. They can neither inquire into the subjective understanding of the probationer, nor analyze the condition in light of legal precedent drawing fine points based on minor differences in the wording of search conditions in other probation orders.[5] The search condition must therefore be interpreted

[5]The only evidence regarding the search condition to which appellant was subject is the minute order reciting the terms and conditions of probation. Neither the People nor appellant offered any evidence regarding the explanation, if any, given by the court or the probation officer at the time probation was granted, or of appellant's understanding of the scope of the consent to search.

on the basis of what a reasonable person would understand from the language of the condition itself, not on the basis of appellant's subjective understanding, or under a strict test in which a presumption against waiver is applied.

We think the wording of appellant's probation search condition authorized the instant search. The condition is worded almost identically to the condition at issue in People v. Mason, supra, 5 Cal.3d 759. As in this case, the defendant in *Mason* agreed as a condition of his probation to "submit his person, place of residence, vehicle, to search and seizure at any time of the day or night, with or without a search warrant, . . ." (5 Cal.3d at p. 762.) We observed in *Mason* that "a probationer who has been granted the privilege of probation on condition that he submit at any time to a warrantless search may have no reasonable expectation of traditional Fourth Amendment protection." (Id. at p. 765.) Consequently, "when defendant in order to obtain probation specifically agreed to permit at any time a warrantless search of his person, car and house, he voluntarily waived whatever claim of privacy he might otherwise have had." (Id. at p. 766.) We read the consent in *Mason* as a complete waiver of that probationer's Fourth Amendment rights, save only his right to object to harassment or searches conducted in an unreasonable manner. (5 Cal.3d at 765, fn. 3.) We see no reason to interpret the condition imposed on this appellant more narrowly.

It is true, as appellant asserts, that some Courts of Appeal have held that search conditions in probation agreements require "reasonable cause"—defined as something less than probable cause—to search. Some of these cases, however, have involved search conditions that expressly

required reasonable cause. (E.g., People v. Kasinger (1976) 57 Cal.App.3d 975; People v. Constancio (1974) 42 Cal.App.3d 533.)[6] Others, such as People v. Guerrero (1978) 85 Cal.App.3d 572, and People v. Bremmer (1973) 30 Cal.App.3d 1058, relied on by the Court of Appeal, reached this conclusion in reliance on parole cases, thus blurring what has traditionally been a distinction between probation and parole searches. (People v. Guerrero, supra, at p. 581 [citing People v. Icenogle (1977) 71 Cal.App.3d 576]; People v. Bremmer, supra, 30 Cal.App.3d at 1063 [citing In re Martinez (1970) 1 Cal.3d 641].) In addition, *Guerrero* mistakenly equated the observation in People v. Garcia (1975) 44 Cal.App.3d 1029, 1032, that officers cannot act arbitrarily or capriciously or harass a probationer, with a requirement of "reasonable suspicion" for a probation search. (85 Cal.App.3d at p. 582.) Each of the cases, moreover, was decided prior to this court's decision in People v. Lilienthal (1978) 22 Cal.3d 891, in which we again held that the search condition alone justifies a warrantless search. "[B]ecause the search was justifiable on this ground it is unnecessary to address defendant's contention that there was no independent probable cause to search. . . ." (Id. at p. 900.)

We have also held that a warrantless search of a *parolee* pursuant to the terms of his parole is unreason-

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[6]As these cases illustrate, if a sentencing judge believes that a "reasonable cause" requirement is warranted in the particular case, either initially or as a modification of the terms of probation (see, e.g., People v. Kern (1968) 264 Cal.App.2d 962, 965), he has the discretion to place such langauge in the probation search condition. Absent such express language, however, a reasonable-cause requirement will not be implied.

able in the absence of reasonable suspicion that the parolee is engaged in criminal conduct or other violation of his parole. (People v. Burgener (1986) 41 Cal.3d 505.) In so doing, however, we noted that under the present statutory scheme governing the parole of felons from state prison the prisoner in no sense consents to the waiver of his Fourth Amendment rights. Rather, the parole search condition is imposed upon him: "The Board of Prison Terms has no discretion to grant or withhold parole to a prisoner who has served a determinate term. The prisoner neither applies for nor has the right to reject release on parole. . . . [T]he parolee's acceptance of parole under the determinate sentence law is in no sense pursuant to a voluntary agreement by which he has waived his right to privacy in exchange for release on parole." (Id. at p. 529, fn. 12.) Only the parolee's status as a felon and the societal interest in rehabilitation and supervision to protect the public justify imposing the warrantless search term of parole. (Id. at pp. 531-532.) Consequently, in determining the proper scope of a parole-search condition, we found it necessary to balance the parolee's privacy interest with the societal interest in public safety. (41 Cal. 3d at p. 532; cf. Griffin v. Wisconsin (1987) — U.S. — [55 U.S. Law Week 5156] [probation search pursuant to administrative regulation].)

No such balancing is necessary here. A probationer, unlike a parolee, consents to the waiver of his Fourth Amendment rights in exchange for the opportunity to avoid service of a state prison term. Probation is not a right, but a privilege. "If the defendant considers the conditions of probation more harsh than the sentence the court would otherwise impose, he has the right to refuse probation and

undergo the sentence. [Citations.]" (In re Bushman (1970) 1 Cal.3d at 767, 776, disapproved on other grounds in People v. Lent, supra, 15 Cal.3d at p. 486, fn. 1; People v. Caron (1981) 115 Cal.App.3d 236, 247.) A probationer's waiver of his Fourth Amendment rights is no less voluntary than the waiver of rights by a defendant who pleads guilty to gain the benefits of a plea bargain. (See Bordenkircher v. Hayes (1978) 434 U.S. 357, 360-364; In re Ibarra (1983) 34 Cal.3d 277, 287.) Were we to include that a probationer's waiver of Fourth Amendment rights were either impermissible or limited to searches conducted only upon a reasonable-suspicion standard, the opportunity to choose probation might well be denied to many felons by judges whose willingness to offer the defendant probation in lieu of prison is predicated upon knowledge that the defendant will be subject to search at any time for a proper probation or law enforcement purpose. We see no basis for denying a defendant the right to waive his Fourth Amendment rights in order to accept the benefits of probation. The reasonable-suspicion standard adopted in *Burgener,* supra, 41 Cal. 3d 505, for parole searches, therefore, has no application to searches conducted pursuant to a consensual probation order.

The Court of Appeal in this case believed that a narrow reading of appellant's search condition was suggested by People v. Mason, supra, 5 Cal.3d 759 and People v. Superior Court (Stevens) (1974) 12 Cal.3d 858, both involving a probationer's agreement to submit to warrantless search "upon request." In *Mason* we stated that a search made pursuant to this condition without defendant's knowledge would be invalid. (5 Cal.3d at p. 763). Finding *Mason* dispositive, in *Stevens* we held unlawful a probation search

of defendant's home made in his absence and without notice. (12 Cal.3d at p. 861). These cases, the Court of Appeal determined, require that an "advance consent" condition be narrowly construed.

The Court of Appeal acknowledged that notice is not required when not included in the search condition. (People v. Lilienthal, supra, 22 Cal.3d at pp. 899-900.) It reasoned, however, that reasonable cause is required because, unlike notice, reasonable cause is an aspect of Fourth Amendment protection. What this reasoning overlooks is that *any* warrantless search is unreasonable per se within the contemplation of the Fourth Amendment *unless* it is conducted pursuant to one of the few, narrowly drawn exceptions to the constitutional requirement of a warrant. (Mincey v. Arizona (1978) 437 U.S. 385, 390.) Consent is such an exception. (Schneckloth v. Bustamonte, supra, 412 U.S. at p. 219; see People v. Mason, supra, 5 Cal.3d at pp. 765-766.) Inasmuch as a search or seizure pursuant to a valid consent does not violate the Fourth Amendment, it is not unreasonable unless it exceeds the scope of the consent. We find no reason to conclude that a defendant who in order to obtain probation specifically agreed to submit to search "with or without a warrant at any time" has waived only the right to demand a warrant. Rather, as we stated in *Mason,* the defendant has voluntarily waived "whatever claim of privacy he might otherwise have had."[7] (5 Cal.3d at p. 766.)

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[7]Although we believe the import of the "warrantless search" condition is clear, any ambiguity on this point can be dispelled if, at the time probation is granted, the defendant is advised of the scope of the search condition. (Cf. Pen. Code, §§ 1203d [copy of probation report furnished defendant before

(Continued on following page)

Our interpretation of the scope of appellant's consent in agreeing to the search condition of his probation is consistent with the dual purpose of such a provision "to deter further offenses by the probationer and to ascertain whether he is complying with the terms of his probation" (People V. Mason, supra, 5 Cal.3d at p. 763). As we recognized in *Mason*: " 'With knowledge he may be subject to a search by law enforcement officers at any time, [the probationer] will be less inclined to have narcotics or dangerous drugs in his possession. The purpose of an unexpected, unprovoked search of defendant is to ascertain whether he is complying with the terms of probation; to determine not only whether he disobeys the law, but also whether he obeys the law. Information obtained under such circumstances would afford a valuable measure of the effectiveness of the supervision given the defendant and his amenability to rehabilitation.' (People v. Kern[, supra,] 264 Cal.App.2d 962, 965.)"

As Justice Sonenshine, dissenting below, observed: "Probationers, by consenting to clear and unconditional conditions such as Bravo's, are on notice their behavior is being monitored. They have, as a condition precedent to receiving the court's leniency, agreed in advance to waive their Fourth Amendment rights. To condition warrantless probation searches upon reasonable cause would make the probation order superfluous and vitiate its purpose. (See also People v. Lilienthal, supra, 22 Cal.3d 891 [,900].)"

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sentence], 1203.12 [written statement of terms and conditions of probation furnished defendant after release on probation].) Oral advice at the time of sentencing would afford defendants the opportunity to clarify any conditions they may not understand and intelligently to exercise the right to reject probation granted on conditions deemed too onerous.

We do not suggest that searches of probationers may be conducted for reasons unrelated to the rehabilitative and reformative purposes of probation or other legitimate law enforcement purposes. A waiver of Fourth Amendment rights as a condition of probation does not permit searches undertaken for harassment or searches for arbitrary or capricious reasons. (See People v. Mason, supra, 5 Cal.3d at p. 765, fn. 3; People v. Turner (1976) 54 Cal.App.3d 500, 507; cf. People v. Pipitone (1978) 86 Cal.App.3d 681, 688 [pretext search].) We hold only that a search condition of probation that permits a search without a warrant also permits a search without "reasonable cause," as the former includes the latter. (See People v. Turner, supra.)

The condition of appellant's probation by which he consented to warrantless search at any time justified the search of his home undertaken by the officers who suspected that he was engaged in narcotics activity. The decision of the Court of Appeal is reversed, and that court is directed to enter its order affirming the judgment of conviction.

PANELLI, J.

WE CONCUR:

LUCAS, C.J.
MOSK, J.
BROUSSARD, J.
ARGUELLES, J.
EAGLESON, J.
KAUFMAN, J.

PEOPLE v. ROBERT TERRY BRAVO

Crim. 24540

COUNSEL FOR THE PARTIES:

FOR PLAINTIFF AND RESPONDENT:	Lilia E. Garcia Deputy Attorney General 110 West A Street, Suite 700 San Diego, CA 92101 (619) 237-6457
FOR DEFENDANT AND APPELLANT:	Michael Ian Garey 611 Civic Center Drive West Penthouse Suite, 4th Floor Santa Ana, CA 92701 (714) 834-0950
TRIAL COURT:	Orange County Superior Court
TRIAL JUDGE:	Honorable James O. Perez
TRIAL COURT NO.:	C-49536

(2)

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No. 87-421

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ROBERT TERRY BRAVO,

Petitioner,

v.

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of
The State of California

BRIEF OF RESPONDENT IN OPPOSITION

JOHN K. VAN DE KAMP,
Attorney General of the
State of California
STEVE WHITE,
Chief Assistant Attorney General
HARLEY D. MAYFIELD,
Assistant Attorney General
LOUIS R. HANOIAN,
Deputy Attorney General
LILIA E. GARCIA,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-6457
Attorneys for Respondent

19 pp's

QUESTION PRESENTED

Does a probationer's consensual agreement to submit to warrantless searches as a condition of probation permit a search of his home by officers who suspected he was engaged in narcotics activity?

TOPICAL INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
REASONS FOR DENYING THE WRIT	8
ARGUMENT	
I. A PROBATIONER'S CONSENT TO SUBMIT TO WARRANTLESS SEARCHES AS A CONDITION OF PROBATION IS A TOTAL WAIVER OF FOURTH AMENDMENT RIGHTS. THUS, A PROBATION SEARCH CONDITION THAT PERMITS A SEARCH WITHOUT A WARRANT ALSO PERMITS A SEARCH WITHOUT "REASONABLE CAUSE" AS THE FORMER INCLUDES THE LATTER.	9
II. THE CASE AT BAR IS NOT IN CONFLICT WITH THIS COURT'S RECENT DECISION IN GRIFFIN V. WISCONSIN (1987) ___ U.S. ___ (97 L.ED.2D 709).	11
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

In re Naito
(1986) 186 Cal.App.3d 1656
___ Cal.Rptr. ___ 12

People v. Burgener
(1986) 41 Cal.3d 505
___ Cal.Rptr. ___ 12

People v. Johnson
(1987) 43 Cal.3d 296
___ Cal.Rptr. ___ 12

People v. Mason
(1971) 5 Cal.3d 759, 488 P.2d 630,
97 Cal.Rptr. 302, cert. den. 405
U.S. 1016 13

Schneckloth v. Bustamonte
(1973) 412 U.S. 218 10

Washington v. Chrisman
(1982) 455 U.S. 1 9

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On Petition for Writ of Certiorari
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The State of California

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The unanimous decision of the California Supreme Court reversing the decision of the California Court of Appeal, Fourth Appellate District, Division Three, is published as People v.

Robert Terry Bravo ((1987) 43 Cal.3d 600), and is reprinted in Petitioner's Appendix A.

JURISDICTION

This Court has jurisdiction to consider this case pursuant to 28 United States Code section 1257, subdivision 3.

CONSTITUTIONAL PROVISIONS INVOLVED

The provisions of the Fourth and Fourteenth Amendments to the United States Constitution are adequately set forth in the Petition for Writ of Certiorari, page 2.

STATEMENT OF THE CASE

In an information filed by the Orange County District Attorney on June 15, 1982, petitioner was charged with possession of cocaine and possession of cocaine for sale, and possession of a firearm. (CT 44; Cal. Health & Saf. Code, § 11350 & 11351; Cal. Pen. Code, § 12021.)

On September 24, 1982, petitioner's motion to suppress evidence was heard and denied. (CT 68, 71a; Cal. Pen. Code, § 1538.5.)

On January 13, 1983, petitioner pleaded guilty to possession for sale of a narcotic and possession of a firearm by an ex-felon. (CT 89-92.) Petitioner was granted probation on various terms and conditions, including he serve a seven month county jail sentence. (CT 89.)

Petitioner appealed the judgment and on February 26, 1985, the Court of Appeal, Fourth Appellate District, Division Three, in a 2-1 decision reversed petitioner's conviction holding that the specific probation search condition accepted by petitioner did not waive all protection from "unreasonable searches." (Published and cited at 165 Cal.App.3d 741 (1985) (reprinted at 184

Cal.App.3d 1256 (1985) to permit tracking).

Respondent sought review of this decision to the Supreme Court of the State of California. On May 16, 1985, review was granted and on July 9, 1987, the California Supreme Court in a unanimous decision reversed the Court of Appeal and affirmed petitioner's conviction. The California Supreme Court held that a condition of probation that permits search with or without a warrant also permits a search without "reasonable cause" as the former includes the latter. Thus, petitioner's consent to a warrantless search at any time justified the search of his home undertaken by officers who suspected petitioner was engaged in narcotics activity.

STATEMENT OF FACTS

As the relevant facts are set forth in the Opinion of the Supreme Court of

the State of California, respondent adds only the following additional comments.

In 1981 petitioner pleaded guilty to possession of concentrated cannabis. He was granted probation and as a condition of that probation agreed to "submit his person and property to search or seizure at any time of the day or night by any law enforcement officer with or without a warrant." (RT 75.)

In February 1982 petitioner was still on probation when an anonymous caller stated to the Anaheim Police Department that he was a neighbor of petitioner, who had just moved into the neighborhood, and he believed petitioner was selling narcotics from his home. His suspicions were based on the volume of traffic in automobiles and people in and around petitioner's home. (RT 76-77.) Because the caller feared retaliation he declined to give his name.

(RT 81.) The caller gave the police petitioner's address. (RT 28.)

Detective Manley of the Anaheim Police Department ascertained petitioner's name and received information petitioner was not currently employed. (RT 28.) Upon receipt of this information, he ran a utilities check on the address given by the anonymous caller and discovered the utilities were being paid by appellant. An inquiry into appellant's background revealed appellant was currently on probation. (RT 29, 33-35.) Detective Manley requested and received a certified copy of appellant's probation order which included the condition that petitioner must submit to warrantless searches. (RT 75.)

Prior to receiving a copy of appellant's probation grant Detective Manley set up a surveillance of petitioner's residence on five or seven

occasions. On one occasion he saw numerous cars parked in front of the house. Since there was construction going on at the side of the house, it was difficult to determine whether this foot traffic was related to the reported narcotic activity. (RT 39, 40.)

Detective Manley's last surveillance of appellant's residence was on or about March 18. Although Detective Manley had not observed the volume of foot and vehicular traffic as reported by the anonymous caller, this did not cause him to doubt the veracity of the anonymous tip. He reasonably believed the sudden drop-off in traffic in and out of petitioner's house had occurred because petitioner may have been tipped off about the surveillance. (RT 50-51, 62-63, 65.)

On March 23, 1982, petitioner's residence was searched. Four ounces of cocaine, packaging paraphernalia,

several thousand dollars in currency and gold and three handguns were found in petitioner's house. (CT 75.)

REASONS FOR DENYING THE WRIT

Certiorari should be denied because the Supreme Court of the State of California fully considered and correctly denied the issue at bar finding that defendant consented to the search in question. In so finding the court relied on prior decisions of this Court, including Washington v. Chrisman (1982) 455 U.S. 1 and Schneckloth v. Bustamonte (1973) 412 U.S. 218, which are controlling.

Moreover, this Court's recent decision in Griffin v. Wisconsin (1987) ___ U.S. ___ (97 L.Ed.2d 709) upholding a warrantless administrative search by probation officers of a probationer's residence, that petitioner alleges is in conflict, differs only because California

and Wisconsin differ in their respective probation systems. The California Supreme Court's decision in Bravo is consistent in application of the concepts set forth in previous, controlling decisions of this Court.

ARGUMENT

I

A PROBATIONER'S CONSENT TO SUBMIT TO WARRANTLESS SEARCHES AS A CONDITION OF PROBATION IS A TOTAL WAIVER OF FOURTH AMENDMENT RIGHTS. THUS, A PROBATION SEARCH CONDITION THAT PERMITS A SEARCH WITHOUT A WARRANT ALSO PERMITS A SEARCH WITHOUT "REASONABLE CAUSE" AS THE FORMER INCLUDES THE LATTER.

This Court has recognized that a search conducted pursuant to a valid consent does not violate the Fourth Amendment unless the search exceeds the scope of the consent. (Washington v. Chrisman (1982) 455 U.S. 1, 9-10.) As petitioner acknowledged his consent to be searched without a warrant at any time, the only issue presented below was the

scope of petitioner's consent. The California Supreme Court relying on this Court's decision in Schneckloth v. Bustamonte (1973) 412 U.S. 218, 235-246, applied its reasoning in finding that the strict test of waiver as applied to fundamental trial rights does not apply to a waiver of Fourth Amendment rights. The California Supreme Court's decision, that no balancing of a probationer's privacy interest with the societal interest in public safety is required where the search is conducted pursuant to a consensual probation order, comports with this Court's rationale in Washington v. Chrisman, supra, 455 U.S. at pp. 9-10 and Schneckloth v. Bustamonte, supra, at pp. 241-246.

The strict test of waiver and principles of narrow construction do not apply in determining the scope of a probationer's consent to submit to

warrantless searches. The scope is determined on the basis of an objective and reasonable test. The only objective and reasonable interpretation of a probationer's advance agreement to warrantless searches is a waiver of both probable and reasonable cause. Any other interpretation would render the warrantless search condition, whose purpose is to deter further narcotic related offenses, useless.

II

THE CASE AT BAR IS NOT IN CONFLICT WITH THIS COURT'S RECENT DECISION IN GRIFFIN V. WISCONSIN (1987) ___ U.S. ___ (97 L.ED.2D 709).

California and Wisconsin's analyses of the validity of probation search conditions differ because each reflects differences in their respective probation systems.

The Wisconsin probation search condition, unlike California, is applied

by administrative regulation to all probationers. The conditions provide for warrantless probation searches on less than probable cause. In contrast, California probation is different in that probation search conditions do not apply to all grants of probation. (People v. Johnson (1987) 43 Cal.3d 296, 316, ___ Cal.Rptr. ___; People v. Burgener (1986) 41 Cal.3d 505, 532-533, ___ Cal.Rptr. ___.) Rather the trial court has discretion to impose a probation condition in a particular case if it is determined to be reasonably related to the crime for which the offender was convicted and to the potential for future criminality. (In re Naito (1986) 186 Cal.App.3d 1656, 1661-1662, ___ Cal.Rptr. ___.)

In contrast to the Wisconsin probationer, the California probationer can refuse to accept probation on the

condition proposed, or can challenge the legality of the proposed condition on an appeal from the judgment or on habeas corpus. (People v. Mason (1971) 5 Cal.3d 759, 764, 488 P.2d 630, 97 Cal.Rptr. 302, cert. den. 405 U.S. 1016.) Thus, the probation search conditions take into account: the dual purposes of probation supervision (rehabilitation and deterrence) (5 Cal.3d at p. 763, 766); the reduced expectation of privacy of the defendant conditionally released to society on probation (5 Cal.3d at pp. 764-765); the defendant's consent to the condition when informed of the proposed conditions (5 Cal.3d at p. 766); the propriety of the search condition and its terms, given the nature of the probationer's past criminality and potential for future criminality (5 Cal.3d at p. 764); and limitations on the

manner in which the search condition is carried out (5 Cal.3d at p. 765, fn. 3).

Unlike the Wisconsin probationer, the California probationer accepts probation pursuant to a voluntary agreement by which he waives his Fourth Amendment rights in exchange for release into the community and in order to avoid a state prison term. A probationer's advance consent to submit to warrantless searches dispenses with any requirement of probable or reasonable cause and constitutes a complete waiver of Fourth Amendment rights.

CONCLUSION

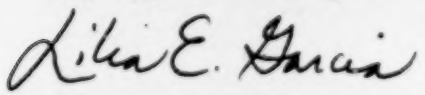
Petitioner's Petition for Writ of Certiorari should be denied as his argument fails to recognize the search conducted pursuant to a valid consensual agreement comports with the consent exception to the Fourth Amendment warrant requirement. Moreover, the issue was

fully considered and correctly decided by the California Supreme Court based on prior decisions of this Court, which are controlling.

Dated: November 24, 1987.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the
State of California
STEVE WHITE,
Chief Assistant Attorney
General
HARLEY D. MAYFIELD,
Assistant Attorney General
LOUIS R. HANOIAN,
Deputy Attorney General



LILIA E. GARCIA,
Deputy Attorney General

Attorneys for Respondent

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

JOHN K. VAN DE KAMP
Attorney General of
the State of California
LILIA E. GARCIA
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101

No: 87-421
October Term, 1987

PEOPLE OF THE STATE OF CALIFORNIA
Petitioner,

v.

ROBERT TERRY BRAVO
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within
as follows: To Joseph F. Spaniol, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

Michael Ian Garey
Attorney at Law
611 Civic Center Drive West
Penthouse Suite, 4th Floor
Santa Ana, California 92701

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 25 day of November, 1987.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, November 25, 1987.

Clifford E. Reed

CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 24 day of November, 1987.

Jean M. Burns

Notary Public in and for said County and State

JEAN M. BURNS
NOTARY PUBLIC - CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Sept. 17, 1991